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AETN
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July 7, 2005

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Communication: CS Docket No. 98-120

Dear Ms. Dortch:

This letter submitted by A&E Television Networks ("AETN") addresses recent reports that indicate the Commission is considering adopting an "either-or" option in the above-referenced proceeding. This plan would allow each broadcast television station to designate either its analog or its digital signal for must-carry status beginning with the upcoming election cycle this October. Such an option is a significant change from current rules under which a station may elect must-carry for its digital signal only after it surrenders its analog license. For reasons that follow, the proposal under consideration is inconsistent with the Act's must-carry provisions and accordingly should not be adopted.

"Either-or" was one of seven policy options initially broached by the Commission in its 1998 Notice of Proposed Rulemaking in this docket and was rejected in the first Report and Order. *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 16 FCC Rcd. 2598, 2604-05 (2001) ("*First R&O*"). As a practical matter, this kind of "either-or" regime would create a *de facto* dual carriage right analogous to that the Commission has now twice rejected, with the most recent rejection coming as recently as February 2005. *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 20 FCC Rcd. 4516 (2005). Under the proposal, broadcasters that elect must-carry for their digital signals would reach far less than half of cable homes, as only that portion presently has digital set-top boxes, leaving cable providers to downconvert the signal to analog for the rest of their subscribers. The end result is that broadcasters would be able to secure dual carriage on both the cable system's digital and analog tiers.

But such a dual carriage regime would benefit only the most powerful television stations, not the weaker stations the Act's must-carry provisions were intended to protect. As the Supreme Court recognized, more popular, stronger stations do not require the competitive leg up of must-carry rights. Rather, they can easily garner carriage in the market and, in fact, are empowered to negotiate for payment or other consideration from cable systems in exchange for

consent to carry their signals. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 191-92 (1997) ("*Turner II*"). They accordingly do not need "either-or" options. Conversely, weaker stations will not be able to shift their must-carry rights to their digital signals and risk losing mandatory carriage on the analog tier. Conferring additional benefits on stronger stations while at the same time putting weaker stations at an additional disadvantage is precisely the opposite of what the Act's must-carry provisions intended to accomplish and, consequently, renders the "either-or" proposal an improper statutory interpretation.

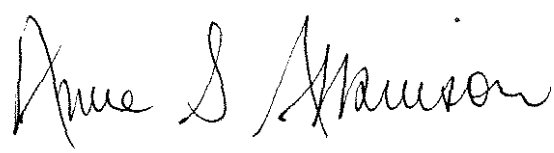
An "either-or" rule would not advance the statutory objectives Congress articulated as the basis for must-carry requirements. As a threshold matter, we note that nothing has changed in the last several months (or, for that matter, since the *First R&O* in 2001), to justify the rule being contemplated, and such a significant change in course undercuts prospects of it surviving judicial review as a permissible construction of the statute. *See Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987) ("When an agency waffles without explanation, taking one view one year and another the next ... [c]ourts are correspondingly less willing to accept the agency's latest word[.]"). In any event, "either-or" would not advance government interests in preserving free over-the-air TV, source diversity, or fair competition, which are the only grounds on which must-carry rules can be adopted under the Act. *Turner II*, 520 U.S. at 190-91 (refusing to consider rationales "inconsistent with Congress' stated interests in enacting must carry"). *See also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001) (finding it impermissible to "supplant the precise interests put forward by the State" in assessing implementation of a statute affecting speech) (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)). In addition, because "either-or" will not advance the statutory objectives articulated by Congress, it will be inherently suspect under the First Amendment, *see supra* (citing *Turner II*, 520 U.S. at 190-91), and accordingly violates well-settled precepts that the FCC must interpret the Act so as to avoid constitutional infirmities. *See, e.g., U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("deference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions").

An "either-or" option also would not advance the digital transition. Instead, it would only lay the groundwork for perpetuating analog service. It would establish an expectation for broadcasters of ongoing dual carriage opportunities, while at the same time creating a disincentive for consumers to transition to digital, based on an expectation of continued carriage of analog signals. Even if "either-or" could aid the digital transition, that is not a legitimate basis for adopting a new flavor of must-carry right, as promoting new types of broadcast services was not among the goals Congress identified and the Supreme Court approved for must-carry. We have demonstrated the substantial disconnect between the imperative to speed the digital transition and the Act's goals underlying must-carry. In this regard, other goals, including facilitating the transition, may not be substituted for those Congress identified. *See, e.g.*, AETN

As AETN has demonstrated throughout this lengthy proceeding, any additional must carry rights are inherently unfair to programming services like AETN that must compete in the marketplace for carriage and that do not have the benefit of a regulatory advantage. As the Supreme Court explained in *Turner*, the burden of must-carry is that, among other things, it makes "it more difficult for cable programmers to compete for carriage." *Turner II*, 520 U.S. at 214. Thus far, the Commission has rejected demands for dual carriage of analog and digital signals and multicast carriage. It should likewise reject the resurrected proposal for "either-or" carriage. This latest proposal would not advance congressional objectives underlying must carry or the digital transition. And whether the unfair competitive burdens on programmers are the result of administrative fiat or would occur as a practical effect of the rules, the result is the same. Consequently, the Commission should reject the "either-or" option.

Respectfully submitted,

A&E TELEVISION NETWORKS

By: 

cc: Chairman Kevin J. Martin
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein